IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 19, 2008 Session

CLARK POWER SERVICES, INC. v. KATIE O. MITCHELL, ET AL.

Appeal from the Chancery Court for Sullivan County
No. 0034243(B) Jerry Beck, Judge

No. E2007-01489-COA-R3-CV - FILED MAY 27, 2008

The issue presented in this case is whether the trial court abused its discretion by not granting the defendants' motion to set aside a default judgment entered against them. After careful review, we find the default judgment was improperly granted and, therefore, should have been set aside. Accordingly, this case is remanded to the trial court for a hearing on the sworn account filed by the plaintiff.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Frank A. Johnstone, Kingsport, Tennessee, for the Appellants, Katie O. Mitchell and Marvin Lee Silcox.

Ronald L. Grimm and Mary L. Abbott, Knoxville, Tennessee, for the Appellee, Clark Power Services, Inc.

OPINION

I. Background

On October 28, 2005, Clark Power Services, Inc. ("Plaintiff") filed a complaint on sworn account against Katie O. Mitchell d/b/a Nitro Bullit Racing and Marvin Lee Silcox d/b/a Nitro Bullit Racing ("Defendants") to recover the face value of a dishonored check in the amount of $31,577.95, plus damages pursuant to Tenn. Code Ann. § 47-29-101. Service of process was issued to the defendants on October 28, 2005. Mr. Silcox was served with the complaint on November 10, 2005, and Ms. Mitchell was served on November 17, 2005. Defendants did not file any responsive pleadings. On January 3, 2006, Plaintiff filed a motion for default judgment with a notice of hearing for February 3, 2006. Defendant Silcox appeared at the hearing but, according to the statement of evidence, was not sworn. At the hearing, Plaintiff called no witnesses, relying on the affidavit it

filed with the complaint, which set forth the amount of the account. The trial court, by order entered on February 3, 2006, granted a default judgment against both Defendants and awarded Plaintiff judgment for the original account balance of $31,577.95, plus prejudgment interest, attorney fees and court costs.

On March 3, 2006, the Defendants filed a motion to vacate and set aside the default judgment pursuant to Tennessee Rules of Civil Procedure 55, 59 and 60. The motion was accompanied by an answer and an affidavit of Defendant Silcox, which asserted that an answer was not filed because, in the words of Defendant Silcox:

> I understood that if I appeared on February 3 the date set for the hearing, that this was enough to contest the claims of Clark Power Services. I talked earlier with counsel for Clark Power Services and told him that we denied we were liable to Clark Power Services, because the work was defective and the motor coach was damaged while in its care.

According to Defendant Silcox's affidavit, on January 1, 2005, Defendants stopped at Flying J Service Center ("Flying J") in Indianapolis, Indiana to have the oil changed in their motor coach. This service was allegedly improperly performed, and the motor coach stopped running before it left the Flying J property. Flying J arranged to have the coach towed to a repair shop, but the coach was allegedly damaged during the towing operation. Plaintiff allegedly agreed to repair certain damage to the coach. After repairs to the coach's engine were made, Defendants issued a check dated February 28, 2005, to Plaintiff for the engine repair in the amount of $31,577.95 and took possession of the coach. The coach, however, became inoperable after only being driven 100 miles, allegedly due to improper workmanship by Plaintiff. Defendant Silcox stopped payment on the check and alleges that he incurred additional bills and damages due to the conduct of Plaintiff. Defendants assert that they have a valid defense to the claim and Plaintiff would not be prejudiced by the relief requested. The trial court denied the motion, and Defendants appeal.

II. Issue

The issue we address is whether the trial court abused its discretion by not setting aside the default judgment.

III. Analysis

A. Standard of Review

We review a trial court's entry of a default judgment and its refusal to set that judgment aside pursuant to a Tennessee Rules of Civil Procedure 60.02 motion under an abuse of discretion standard. ***Tenn. Dep't of Human Serv. v. Barbee***, 689 S.W.2d 863, 866 (Tenn. 1985). "Under the abuse of discretion standard, a trial court's ruling will be upheld so long as reasonable minds can disagree as to the propriety of the decision made." ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn.

2001) (citations omitted). "A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining." ***Id.*** (citations omitted). In the interests of justice, the courts have expressed a clear preference for a trial on the merits. ***Barbee***, 689 S.W.2d at 866. Motions to set aside default judgments are not viewed with the same strictness that motions to set aside judgments after a hearing on the merits are viewed. Rather, such motions are construed liberally in favor of granting the relief requested. ***Id.*** at 867. If there is reasonable doubt as to whether to set aside a default judgment upon proper application, a trial court should exercise its discretion in favor of granting relief from the judgment. ***Wilkerson v. PFC Global Group, Inc.***, No. E2003-00362-COA-R3-CV, 2003 WL 22415359, at *7 (Tenn. Ct. App., E.S., Oct. 23, 2003) (citing ***Keck v. Nationwide Systems, Inc.***, 499 S.W.2d 266, 267 (Tenn. Ct. App. 1973)); ***Reynolds v. Battles***, 108 S.W.3d 249 (Tenn. Ct. App. 2003). The trial court's conclusions of law are reviewed de novo and are accorded no presumption of correctness. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

B. Procedure in a Suit on a Sworn Account

Plaintiff chose to pursue collection of the debt allegedly owed by Defendants by way of a suit on a sworn account as authorized by Tenn. Code Ann. § 24-5-107. The procedure on a sworn account is provided by the statute as follows:

> (a) An account on which action is brought, coming from another state or another county of this state, or from the county where suit is brought, with the affidavit of the plaintiff or its agent to its correctness, . . . and the certificate of a state commissioner annexed thereto, or the certificate of a notary public with such notary public's official seal annexed thereto, . . . is conclusive against the party sought to be charged, unless that party on oath denies the account or except as allowed under subsection (b).
>
> (b) The court *shall allow the defendant orally to deny the account under oath and assert any defense or objection the defendant may have*. Upon such denial, on the plaintiff's motion, or in the interest of justice, the judge *shall* continue the action to a date certain for trial.

Tenn. Code Ann. § 24-5-107 (emphasis added). We discussed the purpose of Tenn. Code Ann. § 24-5-107 in ***State ex rel. Finkelstein, Kern, Steinberg, and Cunninham v. Donald***:

> Our courts have noted that the statute was intended to furnish an easy and inexpensive mode for collecting debts when they are justly due and no real defense exists, unless the account is denied on oath, and thus the plaintiff is put on notice to make the necessary proof. ***Foster & Webb v. Scott County***, 65 S.W. 22 (1901). The statute is quite clear that in the absence of a sworn denial the plaintiff is entitled to

> judgment on the sworn account. However, where an action is brought on a sworn account, a denial under oath makes an issue and puts the plaintiff to the proof of the account, and the probated account is not evidence. ***Cumberland Grocery Co. v. York***, 9 Tenn. App. 316 (1929).

State ex rel. Finkelstein, Kern, Steinberg, and Cunninham v. Donald, No. 02A01-9807-CH-00203, 1999 WL 236407, at *4 (Tenn. Ct. App. 1999).

Pursuant to the statute, a plaintiff can obtain judgment in a suit on a sworn account without the necessity of calling any witnesses unless the defendant files a sworn denial of the account or appears at the hearing and orally denies the account under oath. Tenn. Code Ann. § 24-5-107(a). In the event the defendant appears at the hearing and makes the necessary denial under oath, the plaintiff cannot stand on the sworn account and must prove his or her case. ***Cave v. Baskett***, 22 Tenn. (3 Hum.) 340, 343 (Tenn. 1842) (stating "[a] denial on oath will do away all the force of the plaintiff's affidavit."); *see also* ***Brien v. Peterman***, 40 Tenn. (3 Head) 498, 499 (Tenn. 1859). To prevent the plaintiff from being ambushed by the surprise appearance of the defendant at trial, the trial court is required to continue the case, upon motion of the plaintiff, until a date certain. Tenn. Code Ann. § 24-5-107(b). The trial court also has the right to continue the case in the interest of justice. ***Id.***

Turning now to the case at hand, Plaintiff filed with its complaint a notarized affidavit of its credit manager who provided that the current balance of Defendants' account was $31,577.95, plus interest until July 27, 2005 of $320.10, and no contractually provided attorney fees. Defendant Silcox understood that if he appeared at the hearing that his appearance was sufficient to contest the claim. Defendant Silcox was partially right. His appearance at the hearing had to be coupled with his denial under oath of the account. Although he did appear at the hearing, he was not sworn. The trial court erred in following the default judgment procedure in Tenn. R. Civ. P. 55.01 rather then the mandatory procedure for a suit on a sworn account provided by Tenn. Code Ann. § 24-5-107. The trial court also erred in awarding attorney's fees to Plaintiff because no attorney's fees were provided for in the sworn account.

We note that Defendant Mitchell neither appeared before the trial court at the motion for default hearing nor filed an affidavit with the trial court. The necessary implication from Defendant Silcox's affidavit is that he believed that he could appear on behalf of himself and his mother, Defendant Mitchell, to contest the claim. Although Defendant Silcox could not, as a lay person, represent his mother at the hearing, in a suit on a sworn account, where more than one defendant is jointly sued and, therefore, the defendants are jointly concerned, a sworn denial as to the validity of the account by one of the defendants, if it goes to the account's validity as to all defendants, is a sufficient denial by all the defendants. ***Brien***, 40 Tenn. at 499. In this case, the account concerned involves a two-party check written to Plaintiff for services provided as part of one transaction between Plaintiff and Defendants. Thus, if Defendant Silcox had been sworn and made a denial, his repudiation of the sworn complaint would have been sufficient for both Defendants.

We find that the trial court used an incorrect procedure and that a default judgment should not have been granted against Defendants. The default judgment procedure set forth in Tennessee Rule of Civil Procedure 55.01 cannot be used to shortcut a suit on a sworn account and prevent a defendant from appearing before the court and orally denying the account under oath pursuant to Tenn. Code Ann. § 24-5-107(b). Accordingly, we find that the trial court abused its discretion in failing to set aside the default judgment.

IV. Conclusion

For the foregoing reasons, the judgment of the Circuit Court is reversed, and this case is remanded for a trial on the merits. Costs of appeal are assessed to the appellee, Clark Power Services, Inc.

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SHARON G. LEE, JUDGE